Terrorism, *Miranda*, and Related Matters

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Summary

The Fifth Amendment to the United States Constitution provides in part that "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." In *Miranda v. Arizona*, the Supreme Court declared that statements of an accused, given during a custodial interrogation, could not be introduced in evidence in criminal proceedings against him, unless he were first advised of his rights and waived them. In *Dickerson v. United States*, the Court held that the *Miranda* exclusionary rule was constitutionally grounded and could not be replaced by a statutory provision making all voluntary confessions admissible. In *New York v. Quarles*, the Court recognized a "limited" "public safety" exception to *Miranda*, but has not defined the exception further. The lower federal courts have construed the exception narrowly in cases involving unwarned statements concerning the location of a weapon possibly at hand at the time of an arrest.

The Supreme Court has yet to decide to what extent *Miranda* applies to custodial interrogations conducted overseas. The lower federal courts have held that the failure of foreign law enforcement officials to provide *Miranda* warnings prior to interrogation does not preclude use of any resulting statement in a subsequent U.S. criminal trial, unless interrogation was a joint venture of U.S. and foreign officials or unless the circumstances shock the conscience of the court. They suggest that warnings are a prerequisite for admissibility in U.S. courts following overseas interrogation by U.S. officials.

Miranda applies to courts-martial that are subject to a requirement for an additional warning under the Uniform Code of Military Justice. The statutory provisions governing military commissions call for the admission of some unwarned, involuntary custodial statements. At least one tribunal operating under those provisions has concluded that the Fifth Amendment protections do not apply in the commission trial at Guantanamo Bay of an unprivileged foreign belligerent.

Rule 5 of the Federal Rules of Criminal Procedure requires that federal arrestees be brought before a committing magistrate without unnecessary delay. In the *McNabb v. United States* and *Mallory v. United States* cases, the Court declared inadmissible confessions extracted during a period of unnecessary delay. The cases were decided under the Court's supervisory authority over the lower federal courts, and in *Corley v. United States*, the Court held that *McNabb-Mallory* had been statutorily supplemented with a provision that made admissible voluntary confession given within six hours of presentment.

Neither *Miranda* nor *McNabb-Mallory* violations preclude the subsequent prosecution of the accused; they simply preclude the uninvited use of any unwarned, unwaived statements in such prosecutions.

Related legislative proposals have been introduced in the 111th Congress. P.L. 111-84 (H.R. 2647) prohibits members of the military from providing *Miranda* warnings to foreign nationals captured, or held in Defense Department custody, outside the United States as enemy belligerents. Among the legislative proposals yet to secure enactment, one would prohibit the use of funds to provide such warnings (H.R. 2701); others would restrict their use in the interrogation of high-value detainees overseas (S. 3081 and H.R. 4892); and still others would call upon the Administration to provide Congress with information related to the use of *Miranda* warnings in such circumstances (H.R. 3170, H.Res. 537, H.Res. 570, H.Res. 602).

Contents

Introduction 1
Background 1
Miranda 1
Public Safety Exception 3
Miranda Overseas 4
Miranda and the Military 6
McNabb-Mallory 7
Legislative Proposals 8
P.L. 111-84 8
H.R. 2701 8
H.R. 3170 9
S. 3081 9
H.R. 4892 9
H.Res. 537 9
H.Res. 570 9
H.Res. 602 9

Contacts

Author Contact Information 10

> *No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*. U.S. Const. Amend. V.

Introduction

In *Miranda v. Arizona*, the Supreme Court held that no statement made by an individual during a custodial interrogation may be admitted into evidence against him at his criminal trial, unless he was first warned of his relevant constitutional rights and waived them.[1] In *New York v. Quarles*, the Court later held that the *Miranda* rule was subject to a "public safety" exception.[2] Throughout this period, federal law stated that following arrest a suspect should be presented to a magistrate and advised of his rights without "unnecessary delay."[3] Confessions made during the course of any unnecessary delay are generally inadmissible at the suspect's subsequent criminal trial.[4] The realities of contemporary terrorism are such that some have questioned whether these general rules can be, and should be, re-examined and adjusted.

Background

Miranda

Before *Miranda*, the Supreme Court relied on the Fifth Amendment in federal cases, but had largely relied upon due process guarantees to exclude a defendant's involuntary confession from his criminal trial in cases that came to it from the states.[5] Then, as now, the due process inquiry asks "whether a defendant's will was overborne by the circumstances surrounding the giving of a confession."[6] Recourse to due process was no longer necessary in state cases once it became clear that the Fifth Amendment right was itself binding on the states through the Fourteenth Amendment.[7]

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[1] 384 U.S. 436, 468 (1966).

[2] 467 U.S. 649, 655-56 (1984).

[3] F.R.Crim.P. 5(a).

[4] *Mallory v. United States*, 354 U.S. 449, 455 (1957); see also, *McNabb v. United States*, 318 U.S. 332, 345 (1943); *Corley v. United States*, 129 S.Ct. 1558, 1566 (2009); 18 U.S.C. 3501(c).

[5] *Dickerson v. United States*, 530 U.S. 428, 433(2000), citing inter alia *Bram v. United States*, 168 U.S. 532, 542 (1897) and *Brown v. Mississippi*, 297 U.S. 278 (1936), and noting that "Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment."

[6] *Dickerson v. United States*, 530 U.S. at 434, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); see also, *Brown v. Mississippi*, 297 U.S. at 287 ("Coercing the supposed state's criminals into confessions and using such confession so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country…. In the instance case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured…. The conviction and sentence were void for want of the essential elements of due process").

[7] *Dickerson v. United States*, 530 U.S. at 434 (parallel citations omitted) ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. But our decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Miranda* changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In *Malloy*, we held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. 378 U.S. at 6-11. We decided *Miranda* on the heels of *Malloy*.").

In *Miranda*, the Court provided a more specific standard than the "voluntary under the circumstances" due process test. Convinced that the coercive atmosphere of a law enforcement custodial interrogation could undermine the protection against self-incrimination,[8] the Court declared that confessions that followed such interrogations could only be admitted in evidence against a defendant if he had been given explicit warnings beforehand.[9] That is, the defendant must be warned that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[10]

The warnings having been given, the defendant may explicitly waive them.[11] When a defendant requests the presence of an attorney, questioning must stop until one is made available or until the defendant himself initiates the colloquy.[12] Authorities may not avoid *Miranda* demands by extracting an unwarned confession, providing the *Miranda* warnings, and then eliciting the same confession, this time "for the record."[13] Nor may authorities persistently return to questioning after an interrogation has been stopped by a defendant's claim of privilege—except upon the arrival of requested defense counsel, at the defendant's invitation, or following a break in interrogation-related custody of at least 14 days.[14]

The Court has recognized exceptions to the rule. One, discussed below in greater detail, permits admission into evidence of unwarned statements elicited in the interest of an officer's safety and that of the public.[15] Another permits use of unwarned statements for impeachment purposes.[16] Moreover, on a number of occasions, the Court has declined to recognize a *Miranda* equivalent of the Fourth Amendment's "fruit of the poisonous tree" doctrine.[17]

Shortly after *Miranda* was handed down, Congress sought to overturn it by statute, 18 U.S.C. 3501.[18] For three decades, however, the provision lay dormant, for the Justice Department considered the provision constitutionally suspect, and would not assert it.[19] Thus, when *Dickerson*

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[8] *Miranda v. Arizona*, 384 U.S. 436, 445-58 (1966).

[9] *Id.* at 467.

[10] *Id.* at 479.

[11] *Id.* at 475.

[12] *Edwards v. Arizona*, 451 U.S. 436, 477-78 (1981).

[13] *Missouri v. Seibert*, 542 U.S. 600, 617 (2004).

[14] *Maryland v. Shatzer*, 130 S.Ct. 1213, 1219-224 (2010).

[15] *New York v. Quarles*, 467 U.S. 649 (1984).

[16] *Harris v. New York*, 401 U.S. 222 (1971).

[17] *United States v. Patane*, 542 U.S. 630, 631-33 (2004); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985); *Michigan v. Tucker*, 417 U.S. 433, 451-52 (1974).

[18] S.Rept. 90-1097, at 51 (1968) ("The committee feels that it is obvious from the opinion of Justice Harlan and other dissenting Justices ... that the overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution…. [T]he *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that his legislation would be upheld.…The need for a revision of the *Miranda* decision has been well documented in the proceeding section of this report.").

[19] *Davis v. United States*, 512 U.S. 452, 463-64 (Scalia, J., concurring) ("In fact, with limited exceptions the provision [18 U.S.C. 3501(a)] has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago. See Office of Legal Policy, U.S. Dept. of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 72-73 (1986) (discussing '[t]he abortive implementation of §3501' after its passage in 1968)."); *United States v. Dickerson*, 166 F.3d 667, 682 (4th Cir. 1999) ("The Department of Justice has taken the position that unless the Supreme Court overrules *Miranda*, 'the United States is not free to urge the lower (continued...)

v. United States arose in the Fourth Circuit, the Justice Department declined to defend the section's constitutionality.[20] In spite of Justice Department reservations, the Fourth Circuit decided that section "3501, rather than *Miranda*, governs the admissibility of confessions in federal court."[21] The Supreme Court disagreed.[22] "*Miranda* announced a constitutional rule," which the Court declined to overrule and which "Congress may not supersede legislatively."[23]

Public Safety Exception

In *Quarles*, police officers pursued a rape suspect into a supermarket, frisked him, discovered he was wearing an empty holster, and handcuffed him.[24] They asked him where the gun was; he told them, "the gun is over there" (nodding to some empty cartons); they arrested him, and then read him his *Miranda* warnings.[25] The Supreme Court recognized that the "case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enumerated in *Miranda*."[26]

It contrasted the *Miranda* concerns with the exigencies of the case before it. On one hand, "[t]he *Miranda* decision was based in large part on this Court's view that the warnings which it required police to give to suspects in custody would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house."[27] On the other hand, "[t]he police in this case ... were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety."[28] The Court perceived the exception as a "narrow" one, and believed police would have no difficulty distinguishing "between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect."[29]

The Court has yet to further refine the exception, but the lower federal appellate courts have construed it narrowly—some more narrowly than others.[30] It has been applied in cases

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courts' to 'rely on Section 3501.' See Letter from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys and all Criminal Division Section Chiefs (Nov. 6, 1997).").

[20] *Id.* at 680-82.

[21] *Id.* at 692.

[22] *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

[23] *Id.* at 444.

[24] 467 U.S. 649, 651-52 (1984).

[25] *Id.* at 652.

[26] *Id.* at 653.

[27] *id.* at 656.

[28] *Id.* at 657.

[29] *Id.*

[30] *Matters of Public Safety and the Current Quarrel Over the Scope of the* Quarles *Exception to* Miranda, 78 FORDHAM LAW REVIEW 1931, 1931 (2010) ("However, latent ambiguity arising from the *Quarles* decision authored by [then] Justice William Rehnquist has resulted in a split among the federal courts of appeals as to what constitutes a 'public safety threat.' Some courts broadly extend the *Quarles* exception to inherently dangerous situations, including the threat of an officer mishandling an undiscovered weapon. Other courts narrowly apply *Quarles* to exigent (continued...)

immediately following an arrest when officers have asked an unwarned suspect whether or where a weapon might be found in the immediate area, under circumstances when officers might reasonably believe such a weapon exists and if not secured would pose a danger to themselves or the public.[31]

Although the public safety exception, as currently understood, may only be available in limited circumstances in a terrorist context, its existence suggests that the Court might expand its application under compelling circumstances or might recognize other policy-based exceptions to *Miranda*.[32]

Miranda Overseas

The Supreme Court has thus far not indicated to what extent, if at all, *Miranda* applies overseas. In fact, it has spoken only infrequently about the extent to which the Fifth Amendment applies outside the United States. Its most recent discussion occurred in *Verdugo-Urquidez* when it contrasted the difference between the extraterritorial application of the Fourth and Fifth Amendments.[33] There, it noted a violation of the Fifth Amendment privilege against self-incrimination can only occur at trial; a violation of the Fourth Amendment occurs upon the performance of an unreasonable search or seizure—regardless of whether the fruits of the violation are ever offered at trial.[34] For Fifth Amendment purposes, the point of violation is not the place where a statement was coerced, but the place of the criminal proceedings where the

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circumstances where there is actual evidence that a suspect or other third party could inflict immediate harm to officers or the public.").

[31] *United States v. Are*, 590 F.3d 499, 506 (7th Cir. 2009) ("We, too, have concluded that questioning a suspect about whether he has a gun may fall within *Quarles*' public safety exception…. The FBI agent's question to Daniels about the presence of a weapon in the house falls within the public safety exception to *Miranda*. The question seemed reasonably prompted by a concern for the public safety. Though Daniels was cuffed and the officers and agents had conducted a brief protective sweep, they knew ... he had several prior drug and weapons offenses. But they did not know the location of any weapon that he may have had in the house. A weapon might have been hidden near the place where the officers placed Daniels before taking him outside and thus would have been within his reach.... Furthermore, the presence of Daniels' wife and children bolsters the conclusion that the question about the weapon falls within the public safety exception."); *United States v. Jackson*, 544 F.3d 351, 360 n.9 (1st Cir. 2008) ("The government also argues that the statements at the apartment are admissible, even if they were the product of custodial interrogation, under the public safety exception to *Miranda*'s suppression requirement. The government's contention is without merit. The gun, stuffed inside a cereal box in the refrigerator, was clearly outside of the reach of Jackson, who was not even in the apartment and, in any event, was surrounded by a number of police officers."); *United States v. Liddell*, 517 F.3d 1007, 1011-12 (8th Cir. 2008) ("As I read *Quarles*, the public safety exception to *Miranda* applies only when (1) an immediate danger to the police officers or the public exists, or (2) when the public may later come upon a weapon and thereby create an immediately dangerous situation."); *United States v. Williams*, 483 F.3d 425, 429 (6th Cir. 2007) ("An officer may rely on the public safety exception only if he has a[n] objectively reasonable belief that he is in danger."); *United States v. DeJear*, 552 F.3d 1196, 1201 (10th 2009) (citing *Williams* with approval); see also *United States v. Spoerke*, 568 F.3d 1236, 1249 (11th Cir. 2009); *United States v. Jones*, 567 F.3d 712, 714-17 (D.C.Cir. 2009); *United States v. Reyes*, 353 F.3d 148, 152-55 (2d Cir. 2003).

[32] Cf., *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 203 (2d Cir. 2008)("*Miranda*'s public safety exception would likely apply overseas with no less force than it does domestically. When exigent circumstances compel an un-warned interrogation in order to protect the public, *Miranda* would not impair the government's ability to obtain that information. Second, we emphasize that the *Miranda* framework governs only the admission of custodial statements at U.S. trials. In so far as U.S. agents do not seek to introduce statements obtained through overseas custodial interrogations at U.S. trials").

[33] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-74 (1990).

[34] *Id.* at 264.

statement is offered against the defendant.[35] The Court went on to point out that it previously "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."[36] Moreover, even where it had recognized that American civilians, subject to U.S. overseas court-martial proceedings, were entitled to some Fifth and Sixth Amendment protections, a majority of the Court had been unwilling to define the precise scope of such entitlement.[37]

The lower federal courts, however, have held that the *Miranda* warnings ordinarily do not apply to overseas custodial interrogations conducted by foreign officials. Such unwarned statements may be introduced against the defendant, if voluntary and otherwise admissible.[38] They often identify, but rarely find, two exceptions to this general rule of admissibility—where the interrogation is a joint venture in which U.S. officials are joint participants, or where the circumstances shock the conscience of the court.[39]

Implicit in the first exception is that the privilege against self-incrimination—and the attendant *Miranda* requirements—apply to the admissibility in criminal proceedings in this country of statements taken overseas by U.S. law enforcement officers.[40] A few courts have suggested that this may be said of the statements of U.S. citizens and foreign nationals alike.[41] They have indicated, however, that "where *Miranda* has been applied to overseas interrogations by U.S. agents, it has been so applied in a flexible fashion to accommodate the exigencies of the local conditions."[42]

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[35] *Id.* ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right to criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.")

[36] *Id.* at 269, citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[37] *Id.* at 269-70, citing *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring in the result).

[38] *United States v. Frank*, 599 F.3d 1221, 1228 (11th Cir. 2010); *United States v. Abu Ali*, 528 F.3d 210, 227 (4th Cir. 2008); *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003); *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980); *United States v. Mundt*, 508 F.2d 904, 906 (10th Cir. 1974); *United States v. Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971); *United States v. Mendes-Mesquita*, 541 F.Supp.2d 30, 34 (D.D.C. 2008); *United States v. Marzook*, 435 F.Supp.2d 708, 743 (N.D. Ill. 2006); *United States v. Ravine*, 11 M.J. 325, 329 (C.M.A. 1981).

[39] *United States v. Frank*, 599 F.3d at 1228-229; *United States v. Abu Ali*, 528 F.3d at 227-28; *United States v. Yousef*, 327 F.3d at 145-46; *United States v. Heller*, 625 F.2d at 599; *United States v. Mundt*, 508 F.2d at 906-907; *United States v. Karake*, 443 F.Supp.2d 8, 49 (D.D.C. 2006); *United States v. Marzook*, 435 F.Supp.2d at 743-44; *United States v. Jones*, 6 M.J. 226, 229 (C.M.A. 1979).

[40] Cf., *In re Terrorist Bombings*, 552 F.3d 177, 203 (2d Cir. 2008) ("Other circuits have explicitly recognized the applicability of *Miranda* to custodial statements elicited overseas through the active participation of U.S. agents. In light of these precedents, we are proceeding on the assumption that the *Miranda* 'warning/waiver' framework generally governs the admissibility in our domestic courts of custodial statements obtained by U.S. officials from individuals during their detention under the authority of foreign governments."), citing *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980) and *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980).

[41] *United States v. Clarke*, 611 F.Supp.2d 12, 29-30 (D.D.C. 2009) ("It is by now well-established that the Fifth Amendment privilege against self-incrimination protects nonresident aliens facing a criminal trial in the United States even where the questioning by United States authorities takes place abroad."), citing *In re Terrorist Bombings*, 552 F.3d at 198-201; *United States v. Yousef*, 327 F.3d at 145-46; *United States v. Straker*, 596 F.Supp.2d 80, 90 (D.D.C. 2009).

[42] *United States v. Clarke*, 611 F.Supp.2d at 30 (D.D.C. 2009), citing *In re Terrorist Bombings*, 552 F.3d at 204-205; *United States v. Dopf*, 434 F.2d 205, 207 (5th Cir. 1970); *Cranford v. Rodriguez*, 512 F.2d 860, 862-63 (10th Cir. 1975).

In a case in which overseas statements were offered before an overseas tribunal, a military commission tribunal has concluded that the question of the application of the Fifth Amendment extraterritorially requires a case-by-case consideration.[43]

Miranda and the Military

As a general rule, *Miranda* applies to custodial interrogations conducted in the course of a military criminal investigation. Both by constitutional imperative and statutory command, unwarned statements are inadmissible against the defendant in any subsequent military prosecution.[44]

The statutory provisions applicable to military commissions, however, declare that the Article 831(a), (b), and (d) of the Code of Military Justice (10 U.S.C. 831(a), (b), and (d), relating to compulsory self-incrimination) shall not apply in commission trials.[45] No one may be required to testify against himself in such proceedings.[46] Nor may statements secured by torture or by cruel, inhuman, or degrading treatment be admitted there.[47] Otherwise, statements of the accused may be admitted in evidence, if they are reliable, probative, and either voluntary or were "made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence."[48]

One of the Guantanamo detainees, tried by military commission for the offense of providing material support for terrorism, moved to suppress statements which he contended were secured in violation of the Fifth Amendment.[49] Based on its reading of *Boumediene*,[50] the tribunal determined that

> when analyzing the extraterritorial application of the Constitution in Guantanamo Bay, the Commission concludes that it should consider (1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the

[43] *United States v. Hamdan*, 1 M.C.Rept. 121 (M.C. 2008), available at http://www.wcl.american.edu/nimj/military_commission.cfm.

[44] *United States v. Tempia*, 16 C.M.A. 629, 635-37 (1967); *United States v. DeLaRosa*, 67 M.J. 318, 320 (C.A.A.F. 2009) ("Prior to initiating interrogation, law enforcement officials must provide rights warnings to a person in custody. Military officials and civilians acting on their behalf are required to provide rights warnings prior to interrogating a member of the armed forces if that service member is a suspect, irrespective of custody."), citing *Miranda v. Arizona*, 384 U.S. 436, 445 (1966); *United States v. Tempia*, 16 C.M.A. 629, 637 (1967); U.S. Const. Amend. V; Article 31(b), USMJ (10 U.S.C. 831(b)), and Military Rules of Evidence 305(b)(1), 305(c).

[45] 10 U.S.C. 948b(d)(1)(B).

[46] 10 U.S.C. 948(b).

[47] 10 U.S.C. 948r(a) ("except against a person accused of torture or such treatment as evidence that the statement was made").

[48] 10 U.S.C. 948r(c), (d).

[49] *United States v. Hamdan*, 1 M.C.Rept. at 121. Hamdan sought to enjoin his trial by military commission. Without going to the merits, the court refused the injunction, but noted with regard to an earlier version of the admissibility of involuntary statements: "Another departure [from the standards that would apply in either U.S. criminal trials or courts-martial], and a startling one, is that under 10 U.S.C. §948r(c), evidence obtained by 'coercion' may be used against the defendant so long as the military judge decides that its admission is in the interest of justice and that it has 'sufficient' probative value. *Compare Chambers v. Florida*, 309 U.S. 227 (1940) (reversing conviction and excluding evidence obtained through five days of coercive interrogation)," *Hamdan v. Gates*, 565 F.Supp.2d 130, 132 (D.D.C. 2008).

[50] *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

> nature of the sites where apprehension and then detention took place; (3) whether practical considerations and exigent circumstances counsel against application of the constitutional right; (4) whether the Executive has provided the accused an adequate substitute for the Constitutional right being sought; (5) whether there is "necessity for the Constitution to apply to prevent injustice; and (6) whether application of the Constitutional right would be "impractical and anomalous."[51]

It further concluded that "[t]he preponderance of these factors analyzed weighs against application of the 5th Amendment in Guantanamo Bay."[52]

McNabb-Mallory

"[T]he rule known simply as *McNabb-Mallory* generally renders inadmissible confessions made during periods of detention that violate the prompt presentment requirement of Rule 5(a)."[53] In *McNabb v. United States*, the Supreme Court was faced with a case in which federal officers had disregarded statutory obligations to promptly present arrested defendants to a committing magistrate.[54] The officers had instead detained and interrogated the suspects over the course of several days, until the confessions upon which the defendants' convictions were based had been extracted.[55] The Court found it "unnecessary to reach the Constitutional issues pressed upon" it.[56] Based instead on its supervisory authority over the federal courts, the Court announced that henceforth such confessions, voluntary or involuntary, secured without regard to prompt presentation requirements could not be admitted in evidence against a defendant.[57]

When the various statutory presentation requirements were later superseded by rule 5(a) of the Federal Rules of Criminal Procedure (requiring presentation "without unnecessary delay"), no explicit mention was made of either the *McNabb* exclusionary rule or any other means of enforcement.[58] The Court, however, quickly affirmed the continued vitality of *McNabb* when following the promulgation of rule 5; it reiterated that *McNabb* applied to both voluntary and involuntary confessions.[59] In *Mallory*, it made clear that any "delay must not be of as a nature to give opportunity for the extraction of confession."[60]

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[51] *United States v. Hamdan*, 1 M.C.Rept. at 131.

[52] *Id.* at 134. A second military commission tribunal appears to have concluded as well that suppression issues should be resolved under commission rules—instructed, but not governed, by Fifth Amendment principles, *United States v. Jaward*, 1 M.C.Rept. 349, 350 n.5 (M.C. 2008) ("The Supreme Court's opinion in *Elstad* was based, in part, on the Fifth Amendment self-incrimination and warning requirements that were put in place in *Miranda v. Arizona*, 451 U.S. 471 (1966) as a practical reinforcement of those rights. While, in the case at bar, the accused's self-incrimination protections are set forth in M.C.R.E. 301 and M.C.R.E. 304, a reasonably similar *Elsad* analysis is appropriate with regard to the admissibility of confessions allegedly the product of coercion.").

[53] *Corley v. United States*, 129 S.Ct. 1558, 1563 (2009).

[54] 318 U.S. 332, 342-44 (1943), citing 18 U.S.C. 595, 593; and 5 U.S.C. 300a (1940 ed.).

[55] *Id.* at 334-38.

[56] *Id.* at 340.

[57] *Id.* at 349.

[58] F.R.Crim.P. 5(a), 18 U.S.C. App. (1946 ed.).

[59] *Upshaw v. United States*, 335 U.S. 410, 412 (1948).

[60] *Mallory v. United States*, 354 U.S. 449, 455 (1957); see also *Corley v. United States*, 129 S.Ct. 1558, 1563 (2009) ("delay for the purpose of interrogation is the epitome of 'unnecessary delay'"); *County of Riverside v. McLaughlin*, 500 U.S. 44, 61 (1991) (Scalia, J., dissenting) ("the only element bearing upon the reasonableness of delay was not such circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the (continued...)

A second provision within section 3501 addresses the *McNabb-Mallory* rule, 18 U.S.C. 3501(c). It states that a presentation delay of less than six hours does not by itself render a voluntary confession inadmissible. Recently, the question arose whether, as with *Miranda*, section 3501 was intended to abrogate the *McNabb-Mallory*, rather than to simply limit its application to voluntary confessions made within six hours of detention.[61] The Court held that Congress intended to modify, not repudiate, *McNabb-Mallory*.[62] Thus, "[u]nder the rule as revised by §3501(c), a district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate)."[63] If so, the confession is admissible as section 3501(c) provides, "so long as it was made voluntarily and the weight to be given it is left to the jury."[64] If not, "the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallor*y cases, and if it was, the confession is to be suppressed."[65]

Legislative Proposals

A number of related legislative proposals have been introduced thus far in the 111th Congress. They include:

P.L. 111-84

Section 1040 of the National Defense Authorization Act for Fiscal Year 2010, P.L. 111-84 (H.R. 2647), 123 Stat. 2454 (2009), prohibits members of the Armed Forces as well as Defense Department officers and employees from providing *Miranda* warnings to foreign nationals captured, or held in Defense Department custody, outside the United States as enemy belligerents. The prohibition does not apply to the Justice Department. The section also directs the Secretary of Defense to report to the Armed Services Committees within 90 days on the impact of providing the warnings to detainees in Afghanistan.

H.R. 2701

Section 504 of the Intelligence Authorization Act for Fiscal Year 2010 (H.R. 2701), as reported out of the House Select Committee on Intelligence (H.Rept. 111-186), would prohibit the use of funds authorized for appropriation under the bill to provide *Miranda* warnings to foreign nationals outside the United States who are either in the custody of the Armed Forces or believed to have terrorist-related information. The House passed H.R. 2701, as amended, on February 26, 2010, 156 *Cong. Rec.* H946 (daily ed. February 26, 2010).

(...continued)

prisoner had been secured, to reach a magistrate.").

[61] *Corley v. United States*, 129 S.Ct. 1558 (2009).

[62] *Id.* at 1571.

[63] *Id.*

[64] *Id.*

[65] *Id.*

H.R. 3170

Section 744 of Financial Services and General Government Appropriations Act, 2010 (H.R. 3170), as reported out of the House Appropriations Committee (H.Rept. 111-202), would call upon the Administration to supply Congress with information relating to *Miranda* warnings provided by the Justice Department to foreign nationals who are either in the custody of the Armed Forces or suspected of terrorism. The Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3034 (2009), which absorbed many of the provisions of H.R. 3170, has no comparable provision.

S. 3081

Section 3(b)(3) of the Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010 (S. 3081), as introduced, would direct that an unprivileged belligerent, interrogated under the bill's procedures relating to high-value detainees, not be given *Miranda* or comparable warnings.

H.R. 4892

Section 3(a)(1)(D) of the Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010 (H.R. 4892), as introduced, would require the approval of the Director of National Intelligence before *Miranda* warnings could be provided to high-value detainees believed to have terrorism-related information and captured, held, or questioned by an entity with an intelligence community element.

H.Res. 537

H.Res. 537, as adversely reported by the House Judiciary Committee (H.Rept. 111-189), would call upon the Administration to supply Congress with information relating to *Miranda* warnings provided by the Justice Department to foreign nationals who are in the custody of the Armed Forces in Afghanistan and suspected of terrorism.

H.Res. 570

H.Res. 570 would direct the Secretary of Homeland Security to provide the House with information relating to the immigration status of any foreign national captured in Afghanistan who was given *Miranda* warnings by the Justice Department, is in the Defense Department's custody, may be suspected of terrorism, and may be subject to a transfer or release into the United States for civilian or military proceedings.

H.Res. 602

H.Res. 602 would call upon the Administration to provide the House with information, generated on or after January 1, 2005, and relating to the impact of providing *Miranda* warnings to Defense Department detainees in Afghanistan suspected of terrorism.

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